PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

D2

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

JAN 22 2007

FILE: WAC-02-198-53105 OFFICE: CALIFORNIA SERVICE CENTER DATE:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a staffing company that employs 50 persons and has a gross annual income of $1 million dollars. It seeks to employ the beneficiary as a programmer analyst. The director denied the petition because the petitioner failed to provide sufficient evidence to establish that it was an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the petitioner meets the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F), namely, it is a company in business as an agent involving multiple employers as the representative of both the employers and the beneficiary.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the petitioning entity established that it qualifies as an agent.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

> *(1)* Engages a person to work within the United States;
>
> *(2)* Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;
>
> *(3)* Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section states that:

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity

authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

> (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
>
> (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of employment and to provide any required documentation.

Along with the initial I-129 petition, the petitioner submitted a letter stating the beneficiary's duties as follows:

> As a [p]rogrammer/[a]nalyst, [the beneficiary], under minimal supervision[,] will analyze, review, and rewrite programs, using workflow chart[s] and diagram[s][;] applying knowledge of computer capabilities, subject matter and symbolic logic, converts detailed logical flow chart to computer language[;] resolves symbolic formulations[;] prepares flow charts or diagrams, considering computer storage capacity, speed and intended use of output data. Prepares or receives detailed workflow chart[s] and diagram[s] to illustrate [the] sequence of steps to describe input, output, [and] logical operation[;] compiles and writes documentation of program development and subsequent revisions[;] revises or directs revisions of existing programs to increase operating efficiency or adapt to new requirements. Consults with management and engineering and technical

> personnel to clarify program intent, identify problems and suggest changes[;] writes instructions to guide operating personnel during production runs[;] prepares records, reports, [and] collaborates with computer manufacturers and other users to develop new programming methods[;] assists computer and operators of systems analysts to resolve problems in running computer program[;] [and] assigns, coordinates and reviews work and activities of programming personnel.

The letter stated that candidates for the offered position must possess a bachelor's degree.

On June 10, 2002, the director requested that the petitioner submit a detailed list of all file numbers for beneficiaries who have been approved using the labor condition application, and a copy of the most recent pay stub from the beneficiary's current employer, and a duplicate set of all documentation previously submitted.

In response, counsel submitted the list of beneficiaries on the labor condition application, and a copy of the beneficiary's pay stub, Form I 797B, and a duplicate Form I-129 and supporting documents.

On July 11, 2002, the director denied the petition, finding that the offered position was a specialty occupation and that the petitioning entity was a contractor, not an employer. The director stated that the petitioner located persons with computer backgrounds, negotiated contracts with companies to place computer programmers to complete projects, and received fees from companies for the placements. The director stated that, although the petitioner paid the professional, it was the company that retained full control of the professional and all of his or her job duties.

The director stated that the petitioner provided a subcontract agreement between the petitioner and Enterprise Applications Integrators, LLC (ENAPI), a consulting company, and that the petitioner did not submit with the third party clients who allegedly require the beneficiary's services. The director determined that, without valid contracts, the beneficiary would enter the United States and there would not be a computer programming position for him: he would be waiting to perform services and would not be employed in a specialty occupation. Furthermore, the director stated that the petitioner's contracts or agreements are master agreements that do not obligate the petitioner's client or subcontractor to purchase any services from the petitioner. The director stated that the purchase of services is usually specified on a purchase order or statement of work, specifying the services to be performed by the petitioner, the price and the payment schedule for the services, the delivery

schedule, the acceptance criteria for the services, and the detailed technical and administrative requirements, if applicable. The director stated that the petitioner did not submit a purchase order or statement of work; therefore, it fails to establish that there will be a computer programming position for the beneficiary.

Moreover, the director found that the petitioner did not establish that it would be the beneficiary's employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). Nevertheless, the director stated that the petitioner may establish the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F), essentially, that it qualifies as an agent. The director found that the petitioner more closely fit the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F), specifically, that it was a company in business as an agent involving multiple employers as the representative of both the employers and the beneficiary. To meet this definition, the director stated that the petitioner would need to furnish documentation including a complete itinerary of services or engagements, with the itinerary specifying the dates of each service or engagement, the names of the actual employers, and the addresses of the establishment, venues, or locations where the services will be performed. As previously discussed, the petitioner had not provided this kind of documentary evidence. Thus, the director found that it failed to establish it qualified as an agent under the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F).

Finally, the director found that without valid contracts it could not determine the petitioner's compliance with the terms of the LCA or whether the LCA was valid as to the beneficiary's area of intended employment and the respective wage.

On appeal, counsel maintains that the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), erred in denying the petition. Counsel states that the Service contends that the petitioner did not provide contracts entered into with third party clients who allegedly require the beneficiary's services, and that the petitioner's contracts were merely master agreements between the petitioner and its clients. Counsel maintains that the petitioner did not have an opportunity to provide additional evidence of purchase orders or statements of work. Counsel asserts that a valid contract with the petitioner and a firm involved with computer programming exists, and she claims to submit a copy of the contract, the specific job order, and a detailed statement of the beneficiary's work. Consequently, counsel attests that the petitioner meets the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F), namely, it is a company in business as an agent involving multiple employers as the representative of both the employers and the beneficiary.

Counsel's statements are unpersuasive. The petitioner fails to establish that it meets the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F). To establish the second prong's definition of

agent, the petitioner is required to furnish documentation, including a complete itinerary of services or engagements, with the itinerary specifying the dates of each service or engagement, the names of the actual employers, and the addresses of the establishment, venues, or locations where the services will be performed. Counsel submits the following documents on appeal: a Confidentiality Agreement, a Consultant Services Agreement, and an Assignment Schedule between STA America and the petitioner; and a Short Form Consultant Agreement between Vodafone Americas, Inc. and the petitioner. The Assignment Schedule between STA American and the petitioner provides that the beneficiary will be the consultant; the specified job site will be Oakland, California; and the project's start date will be June 18, 2002 and its duration as "open." The Agreement with Vodafone states that Vodafone requires systems engineering services for a 13-week period, beginning June 18, 2002 to September 19, 2002; that the services will be performed at Walnut Creek, California; and that the beneficiary will be the consultant.

The agreements with STA America and Vodafone fail to establish the second prong's documentary requirement because they do not cover the duration of the beneficiary's intended employment to April 9, 2005. Moreover, it appears that the beneficiary's duties, as described by the petitioner, would not cover systems engineering services as described in Vodafone's agreement.

Moreover, Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the petitioner qualifies as an agent. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The petitioner's documentary evidence submitted on appeal, a Consultant Services Agreement with STA America entered into on June 18, 2002, and a Short Form Consultant Agreement entered into with Vodafone on June 17, 2002, are facts that came into being subsequent to the filing date of the petitoner, June 3, 2002. Thus, they should not be considered in this proceeding.

Furthermore, the documentary evidence contained in the record fails to provide a complete itinerary describing all of the beneficiary's services for the duration of the time requested on the I-129 petition, namely, April 9, 2002 to April 9, 2005. Accordingly, the petitioner fails to establish the second prong at 8 C.F.R. § 214.2(h)(2)(i)(F).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.